

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SHAWN LOUIS MICHAEL HEINEKEN

Claimant

V.

BEN E. KEITH COMPANY

Respondent

AND

TRAVELERS INDEMNITY CO. OF CONNECTICUT

Insurance Carrier

Docket No. 1,071,199

ORDER

Respondent and its insurance carrier (respondent) request review of the December 7, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. William L. Townsley, of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of claimant's January 26, 2015, Discovery Deposition; the Evidentiary Deposition of Lora Miller Seacat, taken July 16, 2015, with exhibits attached; the transcript of Preliminary Hearing from December 2, 2015, with exhibits attached; and the documents of record filed with the Division.

ISSUES

The ALJ found claimant potentially suffered a cervical strain while in physical therapy for his low back complaints. Therefore, he is entitled to evaluation and conservative medical care for his neck complaints.

Respondent appeals, arguing claimant failed to sustain his burden of proving that any work-related injury occurred during physical therapy, the ALJ incorrectly reviewed the

record and identified an alleged injury day that is incorrect and the ALJ ignored causation theories supported by claimant and disregarded the opinion of his own expert witnesses without a credible basis for doing so. Therefore, respondent requests the Order be reversed.

Claimant contends the Order should be affirmed.

The issues on appeal are:

1. Did claimant's cervical injuries arise out of and in the course of his employment with respondent? More particularly, did claimant suffer a cervical spine injury or injuries while attending physical therapy for his low back injury?
2. What is the prevailing factor for claimant's alleged cervical spine injuries?

FINDINGS OF FACT

Claimant began working for respondent on July 8, 2013, out of BETO Junction driving trucks. He is still considered an employee of respondent, but is not allowed to return to work until he is 100 percent released from medical care. Claimant is currently being trained to be a truck driving instructor

Claimant testified that on July 10, 2014, he was working in Independence, Kansas, unloading a truck. As he stepped onto a pallet, he reached down, bending and twisting to grab a box of chicken and felt a pop in his back. Claimant continued to work, and by the end of the day pain was radiating into his left leg and toes. This caused him to have difficulty walking. Claimant testified he had pins and needles sensations in his toes. On a scale of 1-10, he assigned a pain rating of 5 at the beginning of the day and a 7 by the end of the day. Claimant reported the incident and his pain complaints to his supervisor at 1:30 p.m., that day and was sent to the doctor.

Claimant was sent to a Med-Assist clinic in Topeka, was taken off work for two days and given pain medication. Claimant came under the care of Michel Yost, D.O., and x-rays and an MRI were completed. Dr. Yost recommended claimant undergo surgery, but as claimant was not able to get into see a surgeon for a few months, claimant was sent to Dr. Galate for treatment. Claimant testified Dr. Galate recommended physical therapy and spinal injection.

Claimant had an injection, went to physical therapy and, while in therapy, he suffered an injury to his neck. Claimant testified:

I received my first injection on a Monday. I had Tuesday off. Wednesday I went to physical therapy and just through them pulling and having me touch my chin to my chest, I started having pains into my neck on Wednesday and again on Thursday

and, it shot down into my arms, my fingers were tingling. I had constant pain in my neck and shoulders and I have had that since then.¹

Claimant reported this to his therapist and was told that there was nothing they were doing that would cause the kind of pain of which he was complaining. Claimant voiced disagreement and he was sent to another therapist and was provided a totally different type of physical therapy. Claimant indicated his back did not improve from therapy. He did not receive any therapy for his neck. Claimant testified that Dr. Galate told him he would not treat his neck and that he was only allowed to treat the low back.

Claimant indicated Dr. Galate told him he should see another physician and have an MRI of his neck. Claimant did not follow through with this advice. Claimant had therapy for his back until October 2014. At some point in October, claimant felt another pop in his back as he was getting up, and the pain radiating into both of his legs was made worse. Claimant explained his pain “kind of bubbled it and then it leveled back out.”² During this temporary increase in pain, none of claimant’s symptoms changed.

Claimant testified his symptoms are constant pain in his low back that radiates into both legs, tingling, numbness and pins and needles in his toes and feet, severe pain in his neck, stiffness leading into his shoulders and numbness in his hands with periodic tingling in his fingers. He rated his back pain at a 6 and up to a 9 on the pain scale. He testified his neck pain starts in the shoulder blades and goes up into his neck to the bottom of his skull. The pain also goes down into his arms and into his fingers on his right hand, with numbness. He described his neck pain as constant and nagging and rated from a 4 to a 7 on the pain scale. He rated his shoulder pain from 2 or 3 up to a 6 on the pain scale. Claimant takes ibuprofen for his pain.

Lora Miller Seacat, a physical therapist for Mathis Rehab Centers, testified she provides intervention and treatment to patients. Ms. Seacat testified that the direction for treatment of each patient depends on what their physician has ordered and from the physician referral she can choose how to implement those orders.

Ms. Seacat testified she met with claimant upon referral from Dr. Galate for physical therapy. The order had treatment, physical therapy and restrictions checked. The order listed claimant’s restrictions as no bending, twisting, or lifting and to alternate sitting and standing activities in each hour. Claimant was to lift no more than 10 pounds. Ms. Seacat testified that, based on a patient’s restrictions, she determines the appropriate exercises to incorporate in the therapy sessions.

¹ Claimant’s Discovery Depo. at 26.

² *Id.* at 31.

Claimant initially presented for therapy on August 5, 2014, at which time subjective and objective measurements were collected with the goal of determining symptoms, mechanism of injury, what aggravates and relieves pain, collecting past medical history, occupational and social history and imaging that may have been performed. The goal of claimant's therapy was to provide overall relief of pain to allow him to be more active by implementing manual techniques and exercises as intervention.

Ms. Seacat indicated that claimant had no issues during his first course of therapy. Claimant's second course of therapy started August 27. Claimant performed his exercise program without pain provocation. He did have a sensation of increased pressure during manual therapy technique. He had 29 minutes of therapeutic exercise, 20 minutes of neuromuscular reeducation, and 12 minutes of manual therapy.

Neuromuscular reeducation was described as retraining the muscles to work efficiently and doing different techniques to perform functional activities. Ms. Seacat performed manual lumbar traction on claimant, which is a technique used for patients with low back pain. This therapy places the patient in supine position (on their back) with both legs over an exercise ball and passively laying on a plank table. A mobilization strap is applied to the anterior aspect of the patient's thighs and around the therapist. Pressure is applied toward the strap and provides slight disk traction of the lower lumbar spine. Ms. Seacat testified that for patients like claimant with a disk involvement type of injury, the standard of care is to continually assess the patient and ask them how they are feeling throughout the exercise. The purpose is to provide a separation of the disk space and the neural canals where the nerve roots come out of the spine, for increased blood flow and to open the joint spaces to provide relief.

Ms. Seacat indicated there is nothing in this process that would have an impact on the cervical spine.³ She testified the only therapy performed that had cervical involvement was the supine self-sciatic nerve mobilization, which is an exercise where the patient lies in supine and an exercise ball is placed under one leg. The patient then lifts the knee to the chest and, at the same time, tucks their chin to their chest. She indicated that at no time on August 27, before, during or after therapy, did claimant communicate to her any problems with his cervical spine.

Claimant returned for more therapy on August 28 and the only complaint recorded was numbness from seated table stretches localized in his feet, related to therapy the day before. Claimant again had therapeutic exercise, neuromuscular reeducation and manual therapy. This included, but was not limited to, sidelying hip external rotation and hooklying bridging. Claimant did not perform the supine self-sciatic nerve mobilization on August 28. At the end of therapy on August 28, claimant complained his low back pain was a 7 out of 10. After this session, later that day, claimant called in to complain of neck pain radiating

³ Seacat Depo. at 21-22.

into his arms.⁴ Claimant told Ms. Seacat he had experienced nausea because of the neck pain within 45 seconds of leaving therapy. She has never had anyone sustain a neck injury from the provided treatment for low back pain or any other kind of therapy.

Ms. Seacat met with claimant on August 29, when claimant came in to apologize for the incident that happened over the phone the day before. When claimant called in to cancel his August 29 appointment because of neck pain, Ms. Seacat tried to convince him to come in to try and improve his pain, at which time claimant expressed he was upset about his earlier session. In an attempt to convince claimant to continue with therapy, she recommended claimant see another therapist.

Q. Now, so we talked a little bit about the patient not performing the modality correctly even supervised. But isn't there a risk in physical therapy that the patient may injury [sic] themselves when doing the modality correctly?

And I say that because I have injured myself twice doing yoga. So you get somebody that may be deconditioned or has a preexisting condition and they are doing a modality incorrectly and they sustain a injury; is that true?

A. It's hard to predict from person to person.

Q. But it is possible?

A. It could be possible.⁵

Ms. Seacat testified claimant had 6 therapy sessions before August 27 and had no neck complaints. She also testified claimant's therapy could be modified to prevent further problems with claimant's neck. She agreed that the symptoms claimant experienced after his therapy session on August 27 could be symptoms of a neck problem.

At the request of his attorney, claimant met board certified orthopedic surgeon Edward J. Prostin, M.D., on November 18, 2014, for an examination. Claimant complained of low back pain that radiates into his buttocks and hips and occasional numbness and tingling going to his feet. Claimant also complained of difficulty with his neck and looking upward or turning his head to either side. Although Dr. Prostin attributed claimant's low back injury to claimant's work, he attributed claimant's neck injury to the physical therapy for the low back. He recommended an MRI to guide claimant's treatment.

Claimant met with Alexander Bailey, M.D., on October 28, 2014, for an evaluation. Claimant complained of radiating low back pain. The history provided to Dr. Bailey indicated pain complaints in claimant's neck which started after physical therapy. Claimant

⁴ *Id.* at 30-31.

⁵ *Id.* at 37.

was diagnosed with morbid obesity and underlying degenerative conditions of the lumbar spine. Degenerative disc disease, osteoarthritis and lumbar instability at L4-5 and L5-S1 were noted. Dr. Bailey could not say claimant suffered any additional injury to his lumbar spine in July 2014, opining it was no more than an aggravation of claimant's prior lumbar spine disease.

Claimant was referred by the ALJ for an independent medical examination (IME) with board certified orthopedic surgeon Fermin J. Santos, M.D., on March 23, 2015. Dr. Santos was only authorized to examine and evaluate claimant's lumbar spine at that time. Claimant described pain complaints in his neck at that examination, which claimant explained, stemmed from physical therapy for his lumbar spine. Claimant was diagnosed with degenerative lumbar disc disease, lumbar spondylosis and neck pain. The prevailing factor in the need for lumbar spine treatment was the injury of July 10, 2014. Dr. Santos did not attribute the cervical complaints to the July 10, 2014, accident and failed to discuss claimant's allegations of injury while undergoing physical therapy.

In September, 2015, claimant was referred by the ALJ to board certified orthopedic surgeon Matthew N. Henry, M.D., for a second IME. Dr. Henry diagnosed tenderness in both the cervical and lumbar spines with palpation. Degenerative changes in the lumbar spine at L4-5 and L5-S1 were identified. Dr. Henry opined claimant's cervical complaints were more than likely a muscle strain that occurred while undergoing routine physical therapy treatment. However, he cautioned there was nothing done out of the ordinary in therapy that would cause a cervical muscle strain. He also did not relate it to claimant's work injury.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur

during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2014 Supp. 44-508(f)(1)(B) states:

(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2014 Supp. 44-508(g)(h) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

Claimant alleges a cervical spine injury while undergoing physical therapy for a work-related back injury. Claimant contends he first suffered this injury on August 27, 2014. The record indicates claimant did not perform the allegedly offending therapy modality on August 28. He called the therapist after the therapy session on August 28 and reported the cervical problems. The therapy records contain no indication of cervical problems while the therapy was ongoing. Claimant testified the pain began shortly after he left the therapy facility, not while the therapy was ongoing.

Dr. Prostic determined claimant's cervical problems stemmed from the therapy. Neither Dr. Bailey nor Dr. Santos expressed an opinion regarding whether the therapy was the offending activity causing the cervical complaints. Dr. Henry opined claimant's cervical complaints were most likely a muscle strain. He acknowledged the strain probably occurred while claimant was undergoing routine physical therapy treatment. However, he was unable to identify anything out of the ordinary with the therapy that would cause cervical muscle strain.

The Board must first determine whether claimant satisfied his burden of proving he suffered a cervical spine injury while participating in physical therapy for his low back. There is no dispute the physical therapy was ordered for a compensable matter, *i.e.* the low back injury. The medical evidence in this record supports a finding that claimant suffered some type of injury while undergoing physical therapy for his back. Dr. Prostic clearly states so. Dr. Henry found a strain probably occurred while claimant was

undergoing routine physical therapy treatment. Neither Dr. Santos nor Dr. Bailey directly addressed the issue. This Board Member finds claimant suffered an injury to his cervical spine while participating in physical therapy for his low back.

The Board must next determine whether such an injury is compensable under the Kansas Workers Compensation Act. (Act)

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.⁶

The Kansas Supreme Court expanded the natural and probable consequence rule in *Roberts*⁷, holding that any aggravation of the original injury or any additional injury arising from medical malpractice in the treatment of the original injury is a consequence of the original injury. The Court expanded this rule even farther in *Frazier*⁸. In *Frazier*, the injured worker was receiving treatment for a primary injury to his right forearm and shoulder and suffered a back injury during that treatment. The Court determined the back injury was a consequence of the treatment Frazier was receiving for his right forearm and shoulder injury. The Court then rationalized Frazier's aggravation of his preexisting back injury, during the treatment for the work-related injuries, was akin to what occurred in *Roberts*. The back injury flowed from the treatment for the primary injury, and was a natural and probable consequence of the original work-related injury.⁹

The present situation is on point with *Frazier*. This claimant suffered an injury while undergoing treatment for a compensable work-related injury. The prevailing factor for claimant's cervical spine injuries is the physical therapy stemming from the original work-related back injury and the treatment associated with that back injury. Thus, the cervical spine injury becomes a natural and probable consequence of the original work-related back injury and is compensable. The Order of the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

⁶ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

⁷ *Roberts v. Krupka*, 246 Kan. 433, 790 P.2d 422 (1990).

⁸ *Frazier v. Mid-West Painting, Inc.*, 268 Kan. 353, 995 P.2d 855 (2000).

⁹ *Id.* at 358.

¹⁰ K.S.A. 2014 Supp. 44-534a.

as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant suffered an injury to his cervical spine while undergoing treatment for a work-related injury to his low back. This new injury is a natural and probable consequence of the original injury and is compensable.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated December 7, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2016.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge